No. 14799

In the

United States Court of Appeals

For the Ninth Circuit

GEORGE PEOPLES, *Appellant,*

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, *Appellee.*

BRIEF OF APPELLANT

Appeal from the United States District Court,
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

This is an action at law for damages for an alleged breach of a contract of employment. The pleadings in the case were merged in a Pre-Trial Order (R. 4-37) in which it was stipulated that Plaintiff is a citizen of the State of Oregon, the Defendant a Delaware corpora-

tion and the amount in controversy, exclusive of costs and interest, in excess of $3,000.00. (R. 4).

The District Court had jurisdiction under 28 U.S.C. Sec. 1332 (a) (1). This Court has jurisdiction of the appeal under 28 U.S.C. Sec. 1291.

STATEMENT OF THE CASE

This action was brought by George Peoples, appellant, a railroad brakeman, against his former employer, Southern Pacific Company, appellee, to recover damages for a breach of appellant's contract of employment with appellee, allegedly resulting from his being discharged by appellee without being given notice of the specific charges against him and of the time and place of the formal investigation or hearing and without being given the opportunity to be present or represented at the hearing.

The parties, through their attorneys, approved and the Court made and entered a Pre-Trial Order which supplanted the pleadings in the case. (R. 4-37). This order contains a statement of certain agreed facts (R. 4-25); and statements of the contentions of the respective parties (R. 26-35).

Among the admitted facts were the following:

Appellant was employed by appellee as a brakeman

in its Portland Division in the State of Oregon from July 21, 1947, until November 24, 1952. (R. 15-16). On the latter date his employment was effectively terminated by appellee. (R. 18).

Appellee is a railroad engaged as a common carrier in interstate commerce. (R. 4). During the entire period of appellant's employment there was in effect a collective bargaining agreement between appellee and the Brotherhood of Railroad Trainmen (herein called BRT). (R. 5, 15). Appellant was employed subject to this agreement. (R. 15-16). Appellee and certain of its employees, including appellant, were subject to the terms and provisions of the National Railway Labor Act. (R. 4).

On August 29, 1952, appellant was working from the extra board maintained by appellee at Roseburg, Oregon. (R. 16). He resided in Ashland, Oregon. (R. 17).

Appellant was absent from work from August 29, 1952, until after November 24, 1952. (R. 19).

The collective bargaining agreement between appellee and BRT, Article 57 (b), provided that no employee could be disciplined or discharged without a fair and impartial investigation before a proper officer of the company at which the employee could be repre-

sented. Section (c) of the same Article stated that when a formal investigation was to be held that the employee should be given written notice of the specific charges and the time and place of the investigation sufficiently in advance to arrange for representation and witnesses. (R. 10).

On November 5, 1952, appellee directed a letter to appellant addressed to him at Neil Creek Road, Ashland, which stated that the records showed appellant had been absent without authority and that, if so, his absence was in violation of Rule 810 and, unless due to good and proper reason, was sufficient cause for termination, and that appellant was notified to appear for an investigation at Roseburg on November 18th. Appellant did not receive the letter and it was later returned to appellee unclaimed. A formal investigation was held on November 18th. Appellant was not present or represented. The trainmaster who conducted the investigation recommended that appellant be discharged for violation of appellee's General Rule and Regulation No. 810. The division superintendent concurred in the recommendation and appellant was removed from service effective November 24th. A letter sent by appellee to appellant dated November 24, 1952, advising of this action and addressed to the same address as the previous letter was returned to appellee unclaimed. (R. 17-19).

On the basis of the foregoing admitted facts appellant contended in the Pre-Trial Order that he had been discharged in violation of his contract of employment. (R. 26-27).

The appellee contended, first, that the appellant was employed under a contract of employment terminable at will by either party; second, that, in any event, the appellee had good cause of discharge for discharging the appellant for violation of General Rule and Regulation No. 810 and failure to comply with Special Notice No. 279 and for long continued absences from work; and, third, that appellee made every reasonable effort to locate the appellant and give him notice of the investigation held on November 18, 1952, and that this was in compliance with the collective bargaining agreement. Fourth and finally, the appellee contended that the appellant did not comply with the appeal procedure or time limitations set forth in the collective bargaining agreement with the BRT; that those procedures were exclusive and that the appellant was wholly barred and estopped by his delay and failure to comply with the grievance procedures of Article 58 of the collective bargaining agreement from maintaining an action for damages for an alleged breach of contract. (R. 33-36).

Appellant contended that appellee was not in any way excused from compliance with Article 57 of the

agreement and alleged that appellant had, on or about September 10, 1955, notified appellee's agent in charge at Ashland, the station agent, of his address; that by rule and practice of appellee he was required to report his address to the officer of appellee in charge at his home terminal; that it was through this agent that notices to employees were customarily sent; that appellee made no effort to ascertain his whereabouts through the persons most apt to know, the station agent and chief clerk at Ashland, and appellant's neighbors and landlord at Ashland; and that the notice of the hearing was not sent to appellant's last known post-office address in Ashland, P. O. Box 321. (R. 29-30).

The appellant, in the Pre Trial Order, contended that this action did not involve the issue of whether appellee had cause to discharge the appellant or whether he could have been justly discharged if the contract procedures had been followed. Appellant, however, admitted certain facts with respect to the merits of the discharge in the event that it was held that they constituted an issue in the case. (R. 30). In this connection it was agreed that General Rule and Regulation No. 810, which had been issued by the appellee before August 29, 1952, provided:

> "Employes must not engage in other business without permission of the proper officer. They must not absent themselves from their employment without proper authority. They

must report for duty at the prescribed time and place, remain at their post of duty, and devote themselves exclusively to their duties during their tour of duty.

"An employe subject to call for duty must not absent himself from his usual calling place without notice to those required to call him." (R. 24).

Appellant admitted he had knowledge of this regulation (R. 25).

It was also agreed that Special Notice No. 279 was issued by the appellee on December 10, 1951, and provided as follows:

"Train, engine and yard service employes may not be absent for more than seven calendar days at one time without securing authority from Supervisor (Trainmaster, Road Foreman of Engines or General Yardmaster).

"Crew Dispatchers and others handling crew boards are not authorized to grant leaves for more than seven calendar days.

"In case of illness which may incapacitate an employe for more than seven days, it is necessary that proper advice be given to Supervisor, advice to include name of doctor attending, and written permission must be secured to cover leave.

"Leaves of absence should be anticipated as much as possible so they may be handled in orderly manner."

The appellant denied that he had notice of this special notice or that it was complied with or followed in the division. (R. 32).

Appellant alleged the following disputed facts:

On August 28, 1952, he learned that his father was critically ill in Nebraska and he was requested by a member of the family to come to Nebraska to see his father. He notified the crew dispatcher, who was in charge of the extra board at Roseburg, of these facts and was told that he could leave for this purpose on giving notice to that office. He gave such notice by telegram on August 29, 1952. He was required to be absent because of his father's illness until on or about December 1, 1952, at which time he reported to work and learned that he had been removed from service. On or about September 20, 1952, he had notified the station agent of appellee at Ashland of his address in Nebraska. He had received no notice to return to work. (R. 31-32).

Appellant also alleged that it was customary and accepted practice in the Portland division of appellee's operation for employees to lay off work for personal reasons for indefinite periods without securing any written leave of absence after seven days; that it was customary and accepted practice for employees who wished to lay off for personal reasons to notify the appellee that they were laying off "sick" and, in such cases, they were not expected or required to return to work until they were notified to do so and that such notice was customarily given through the agent of the

appellee in charge of the employee's home terminal which, in this case, would have been the agent at Ashland. Appellant also contended that other employees in the past had been absent for the same reasons for indefinite periods without disciplinary action being taken against them. (R. 30-32).

The following admitted facts appear in the Pre-Trial Order which are relevant to the contention of appellee that appellant failed to exhaust the grievance procedures of the collective bargaining agreement and that such failure is a bar to an action for damages:

Article 58 of the collective bargaining agreement is entitled "Limitation in Presenting Grievances". Sections (a) and (b) provided that the general committee of the BRT would represent all trainmen in the making of contracts, rates, rules, working agreements and interpretations thereof and that the right of the employee to be represented in the handling of his grievances by the BRT was conceded. (R. 13).

Section (c) prescribed time limitations in the presentation and processing of grievances in the following steps: (1) submission of claim in writing within 90 days of occurrence; (2) submission of written grievance to superintendent within 90 days from date of notice declining claim; (3) notice to superintendent of intention to appeal to higher officers within 90 days of latest

decision of superintendent declining claim; (4) submission to highest general officers of carrier designated to handle claims and discussed in conference with him within one year from date of superintendent's last letter denying claim, or date of letter of local chairman of BRT of intention to appeal the claim or case; or date of superintendent's last letter submitting proposed joint statement of facts; (5) proceedings for final disposition of the claim to be instituted within one year from date of highest officer's decision and officer notified, otherwise decision of highest officer final and binding. (R. 13-15).

Section (d) of this article provided that trainmen who were dismissed might be re-employed at any time; but would not be reinstated unless the case was pending in accordance with the provisions of section (c) of the Article. (R. 15).

After the appellant learned that he had been discharged, he and his representative, Marion Felter, an official of the United Railroad Operating Crafts, had certain correspondence with the appellee with respect to the discharge. On January 10, 1953, Felter wrote to appellee's superintendent asking for favorable consideration of reinstatement of Peoples and setting forth the purported facts with respect to the reasons for Peoples' absence. (R. 19). On January 12, 1953, the superin-

tendent replied to this letter and stated that he regretted there was nothing that could be done toward giving favorable consideration to permit Peoples to return to service. (R. 20). On March 3, 1953, Felter again wrote the superintendent, this time requesting an appointment to confer. (R. 21). An appointment was made for March 16th, which was not kept by Felter because he did not receive the notice of the appointment until too late to keep it. (R. 21-22). On March 19, 1953, Felter wrote the superintendent explaining why he did not keep the appointment and stating that there was more information that he wanted available before he discussed the matter and that if it appeared advisable he would again contact the superintendent for an appointment. (R. 22).

On August 29, 1953, the appellant, himself, wrote the superintendent asking whether it was possible for him to get reinstated and stating he would be grateful for it. (R. 22-23). Hopkins, the superintendent, replied to this letter on September 1, 1953, advising the appellant that he regretted there was nothing that could be done in regard to returning him to Southern Pacific service. (R. 23). On November 25, 1953, Felter addressed a letter to J. J. Sullivan, Manager of Personnel of the appellee, with a copy to the superintendent. (R. 23). A reply to this letter was made by

E. D. Moody, under date of January 6, 1954. Moody acknowledged receipt of Felter's letter of November 25, 1953, to Sullivan. He stated the case had been referred to Moody for reply since he had been designated the highest general officer pursuant to the provisions of the Railway Labor Act for the handling of disciplinary matters on appeal and that in reviewing the file it was found that no appeal had been taken from the superintendent's last decision within 90 days from its date and that under the terms of Article 58 of the agreement the claim was deemed to have been abandoned and was not properly before him for consideration. (R. 23-24).

The appellant contended in the Pre-Trial Order that he was not required to follow the procedures set forth in Article 58 of the agreement; that Article 58, considered with subparagraph (a) of Article 57 provided for a voluntary procedure only; that such procedure was preliminary to proceedings before the National Railroad Adjustment Board and not related to bringing an action for damages for breach of contract and that, in any event, the appellant was excused from using these procedures because of the acts and conduct of the appellee. (R. 27-28).

The District Judge, in his findings, held that the appellant was dismissed by appellee from service for

violation of Rule 810; that Article 58 of the collective bargaining agreement prescribed the steps which must be taken and the time limitations covering each step if the employee decides to challenge any action taken by the employer; that the appellant, by Felter's letter of January 10th, presented a written grievance to the superintendent challenging the validity of his dismissal; that this was accepted as compliance with Article 58 (c), Item 3, and that the claim was declined by Hopkins' letter of January 12th in accordance with Item 3 of Section (c), Article 58; that after January 12th no notice of intention to appeal to a higher authority was given to the superintendent; and that the appellant did not comply with the grievance procedure, including the time limitations included in the collective bargaining agreement. (R. 42-44).

The Court concluded that there was no genuine issue as to any fact or facts material to appellant's motion for summary judgment; and that the appellant could not recover under the applicable collective bargaining agreement because of the complete failure to comply with the successive steps set forth in the agreement, which steps are essential conditions precedent to the creation and maintenance of a cause of action. (R. 44-45).

SUMMARY OF ISSUES PRESENTED ON APPEAL

This appeal presents the following basic issues:

(1) Whether the exhaustion of the contract procedures provided in Article 58 of the collective bargaining agreement was a condition precedent to or a limitation on the maintenance of an independent civil suit for damages.

(2) If so, whether the exhaustion of such procedure by appellant was excused by the action and conduct of appellee.

(3) Whether there was a genuine dispute on material facts which precluded the entry of a summary judgment for appellee.

(4) Whether under the undisputed facts appellant was entitled to a summary judgment on the question of liability.

SPECIFICATION OF ERROR No. I

The District Court erred in holding that the plaintiff could not recover in this action because of his failure to comply with the provisions of Article 58 of the collective bargaining agreement.

The District Court, in its Findings of Fact No. VI, found that Article 58 of the collective bargaining agree-

ment prescribed the steps which must be taken and the time limitations covering each step if an employee desired to challenge any action taken by his employer with respect to his employment and, in Findings VII, VIII, IX and X, found that the plaintiff, through his representative, on January 10, 1953, presented a written grievance to the superintendent which was accepted as compliance with Article 58, section (c), Item 3; that on January 12, 1953, the superintendent declined the claim and that after that date no notice of intention to appeal to a higher officer was given the superintendent in writing within 90 days. (R. 42-43). The Court concluded, in its Conclusion of Law No. III that the plaintiff could not recover because of his complete failure to comply with the successive steps set out in the agreement, which steps are essential conditions precedent to the creation and maintenance of his cause of action.

The issue raised by this specification of error was covered by the following points in appellant's Statement of Points on Appeal: 3. (Exceptions to Findings VII, VIII, IX and X); 4. (Exception to Conclusion of Law III); 5. (c), (d), (f), (g), (h). (R. 49-52).

In consideration of this specification of error certain preliminary propositions of law which have been recognized in actions of this kind should be noted.

Preliminary Propositions

1. Appellant's rights and duties are to be determined under his individual contract of employment or hiring with the appellee, which contract is subject to the terms and conditions of the collective bargaining agreement between the appellee and the BRT.

J. I. Case v. NLRB, 321 U.S. 332 (1944);

Association of Westinghouse Salaried Employes v. Westinghouse Electric Corporation, 348 U.S. 437 (1955).

2. The collective bargaining agreement insofar as it relates to disputes and relations between the employer and the collective bargaining representative is subject to the applicable federal law governing labor-management relations in interstate commerce, in this instance, the National Railway Labor Act (45 U.S.C., Sections 151-163).

J. I. Case v. NLRB, 321 U.S. 332 (1944);

Association of Westinghouse Salaried Employes v. Westinghouse Electric Corporation, 348 U.S. 437 (1955);

Slocum v. Delaware, L. & W.R. Company, 339 U.S. 239 (1950);

Olson v. Potlatch Forests, Inc., 200 F. (2d) 700 (C.A.-9; 1953).

3. Under Federal law the procedures and remedies under the NRLA, including the procedures before the National Railroad Adjustment Board, are exclusive in "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules or working conditions".

45 U.S.C., Section 153 First (i).

This section has been interpreted to mean that disputes whose settlement will have prospective as well as retrospective importance to the carrier and to its employees are within the exclusive jurisdiction of the National Railroad Adjustment Board.

Slocum v. Delaware, L. & W.R. Company, 339 U.S. 239 (1950).

It is well established that the reinstatement of an employee with restoration of seniority rights is a matter of prospective importance which falls within the exclusive jurisdiction of the National Railroad Adjustment Board and that a civil court does not have jurisdiction to enter a decree in a civil action to provide for reinstatement.

Slocum v. Delaware, L. & W.R. Co., 339 U.S. 239 (1950);

Walters v. C. & N.W.R. Co., 216 F. (2d) 332 (C.A.-7; 1954);

Keel v. Illinois Terminal R. Co., 346 Ill. App. 169, 104 N.E. (2d) 659 (1952);

Brook v. Chicago, R.I. & P.R. Co., 177 F. (2d) 385 (C.A.-8; 1949);

Broady v. Ill. Cent. R. Co., 191 F. (2d) 73 (C.A.-7; 1951).

It has also been held that the administrative remedy provided by the National Railroad Adjustment Board in a civil action for damages for breach of contract are mutually exclusive and that where an employee has unsuccessfully sought reinstatement through the procedures of the NRAB he is barred from bringing an independent action for damages.

Michel v. L. & N.R. Co., 188 F. (2d) 224 (C.A.-5; 1951;) cert. den. 342 U.S. 862;

Hecox v. Pullman Co., 85 Fed. Supp. 34 (D.C. Wash. 1949).

It is equally well established, however, that the availability of the administrative remedy under the NRLA does not exclude an independent action under state law for breach of an individual contract of employment of a particular employee.

Moore v. Illinois Central Railway Co., 312 U.S. 630 (1941);

Slocum v. Delaware, L. & W.R. Company, 339 U.S. 239 (1950);

Transcontinental and Western Air, Inc. v. Koppal, 345 U.S. 653 (1952).

In the Koppal case cited above, the Court, after quoting from the decision in the Slocum case, concluded that the National Railroad Adjustment Board did not have exclusive jurisdiction over the claim of the employee that he was unlawfully discharged. The Court stated:

> "Such employee may proceed either in accordance with the administrative procedure prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover as he did in the *Moore* litigation, *supra*, under Mississippi law.
>
> "On the other hand, if the applicable law, as in Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so * * *." (at Page 661.)

Under these established principles, appellant's rights under his individual contract of employment and the interpretation of that contract are to be determined under the law of the State of Oregon, in which the contract was made and to be performed. (R. 15).

Point: Under the law of Oregon an employee who has been discharged by his employer contrary to the provisions of his contract of employment has a cause of action for damages and in such action may recover as damages the loss of wages he has suffered, both past and prospective.

Quick v. Swing, 53 Or. 149, 99 Pac. 418 (1909);
Doolittle v. Pacific Coast Safe and Vault Works, 79 Or. 498, 154 Pac. 753 (1916).

Point: Under Oregon Law appellant was not required to use or exhaust the procedures provided for in Article 58 of the Agreement.

a. There is no Oregon decision on the precise issue in question. The appellant will rely on Oregon statutes and decisions relating to the construction of contracts and the effect given to contract provisions limiting the right to maintain actions for breaches of contracts.

The Trial Court, in its opinion, in holding that an employee must exhaust his administrative remedies in an employment contract before he can maintain an action for an alleged breach of such contract, referred to its decision in an earlier unreported case in which it had relied on the case of *Beck v. General Insurance Company*, 141 Or. 446, 18 P. (2d) 579 (1933). The *Beck* case was an action on a liability insurance policy.

The policy contained the condition that no action would lie against the company to recover on any claim unless brought within two years of final judgment against the insured. The Court held that this provision was not unreasonable and was therefore valid and precluded recovery by the plaintiff. The present case involves different problems and considerations than the *Beck* case. In the *Beck* case there was no question of interpretation since the condition was explicitly stated in the agreement. The issue was whether the condition was valid and enforceable. The condition was of a different character than the one in the present case. For reasons that will be hereinafter pointed out, in the instant case the use of the grievance procedure was not made a condition to maintaining a civil action and, even if so construed, constituted not simply a time limitation but an arrangement for arbitration which was unenforceable under Oregon law.

In the proceedings below the appellee had contended that (1) the appeal procedure provided in the collective bargaining agreement is exclusive and (2) that appellant was estopped and barred from maintaining an action for damages by his delay and failure to comply with the grievance procedure set forth in Article 58 and that he may not assert the instant claim against

appellee because he had not complied with Article 58. (R. 34-36).

The Court below did not explicitly find or conclude that the contract procedure was exclusive but did explicitly hold that exhaustion of it was a condition precedent to liability for damages. In its opinion the court referred to the *Beck* case which was a case involving the application of a provision which was a limitation on the remedy.

The court also cited the case of *Barker v. Southern Pacific Company*, 214 F. (2d) 918 (CA-9; 1954). In the *Barker* case, which arose under the law of California, the agreement provided that any employee who was to be dismissed should be given notice in writing of the reason or cause and that, if dissatisfied, he should be given a fair and impartial hearing upon written request before the expiration of 10 days from notice of dismissal. Plaintiff had failed to file the written request within the ten day period. The Court held that plaintiff had no cause of action for damages for discharge because the conditions required to be performed by him before he could claim a breach of contract had not been fulfilled. The Court stated:

> "* * * Only if the company failed to accord to appellant the hearings provided after notice or by arbitrary disposal of his claim would there have been a breach of his contract. * * *" (at Page 919.)

In the *Barker* case, therefore, the employee was required to give the notice before any obligation on the part of the employer came into being. Giving the notice was, therefore, a condition precedent to performance of a promise on the part of the employer. In the present case the initial promise to be performed was that of the employer: the promise to give the employee notice of charges and a formal investigation before dismissal. There was no condition precedent to be performed by the employee before this duty arose or its breach took place. The use of the procedure provided for in Article 58 could not have preceded this breach. It could only have followed it. Therefore, if use of the grievance procedure is a pre-requisite to recovery, it must be because it is a limitation on or a condition precedent to the remedy.

b. Under Oregon law governing the construction of contracts, the provisions of the collective bargaining agreement relating to use of the grievance procedure were not a condition precedent to or limitation on appellant's bringing an action for damages for breach of his contract of employment.

First, certain general rules of construction should be observed.

The agreement must be construed as a whole and

all the relevant provisions construed together to arrive at their true meaning.

> "In the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all."
>
> *ORS 42.230.*

To imply a condition precedent in an agreement is disfavored in the construction of contracts and the intention of the parties to impose such a condition should be made clear in the agreement.

> *Kelp Ore Co. v. Brooten,* 129 Or. 357, 277 P. 716 (1929).

The provisions of the collective bargaining agreement material to the question under discussion are found in Articles 57 and 58 of the agreement. The sections most directly relevant are Section (a) of Article 57 and Sections (c) and (d) of Article 58. Since these Articles are set forth verbatim in the record on pages 9 to 15, inclusive, they will not be repeated here.

Section (a) of Article 57 is a basic section which gives to each employee the right to present a grievance, personally, or through a union committeeman, to the

superintendent. By its terms it covers any type of grievance, and is not limited to disciplinary or discharge cases. The remaining sections of Article 57 give each employee the right to a formal investigation before being disciplined or discharged and prescribe the procedure for this investigation. (Section (a) presumably entitles an employee disciplined or discharged under the procedures of Section (b)-(k) to present a claim or grievance to the superintendent if he is dissatisfied with the treatment given in the disciplinary proceeding.)

The provisions of Article 58, including section (c) thereof, should, therefore, be construed with the provisions of Article 57, Section (a) in which the right to present a grievance is given and which defines the basic meaning of the right. Article 57, Section (a) is general and Article 58 (c) provides the details and time limitations in certain types of cases, namely, time claims and disciplinary cases.

Article 57 (a) gives the employee the right to present a claim but does not require him to do so for any purpose. It states he "*shall have the right to present his case*" and that the superintendent's decision "*may*" on written notice to the Superintendent, be appealed to the General Manager or his designated representative." (Emphasis supplied.) This section

makes no reference to a civil action by the employee. It does not in any way suggest that such an action may not be brought or that it cannot be brought until after the grievance procedure has been followed.

Likewise, Article 58 contains no express reference to an independent action for damages. This article does state in section (c), Items 2, 3 and 5 that if "claims" and "disciplinary cases" are not submitted in the manner and within the time provided they shall be deemed abandoned. Item 6 provides that the decision of the highest officer designated by the carrier shall be final and binding unless within one year after his decision "proceedings for final disposition of the claim" are instituted by the employee or his representative and the officer is notified.

The agreement does not define the terms "claim" or "disciplinary case," as used in the agreement. Nor does it define the word "proceedings" used in Item 6. It is submitted that the meaning to be given these terms must depend upon the context in which they occur and in light of the purposes and intentions of the parties. So construed, they cannot be held to include within their meaning an independent suit for damages for wrongful discharge. On the contrary, other provisions of the agreement make clear that the claim of a discharged employee made through the contract procedure

is a claim to reinstatement and not a claim for damages for alleged wrongful discharge.

Section (d) of Article 58 provides:

> "Trainmen who are dismissed may be re-employed at any time; but will not be reinstated unless case is pending in accordance with provisions of Section (c) of this Article."

The distinction between a claim for damages and a claim for reinstatement is a clear and important one. Reinstatement is a remedy that can be granted only by the employer with the consent of the collective bargaining representative or through the processes of the NRAB. It cannot be granted by the decree or judgment of a civil court except in an action to enforce an award of the NRAB.

See cases cited on pages 17-18 of this brief.

Reinstatement connotes a resumption of the employment relationship and restoration of seniority rights and therefore affects the future relations of employer, employees and the collective bargaining representative. It involves collective rights and duties arising under the collective bargaining agreement. The damage claim arises out of the rights of the individual employee only. It presupposes a termination of the employment relationship.

"Our holding here is not inconsistent with our holding in *Moore v. Illinois Central R. Co.*, 312 U.S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A commonlaw or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

Slocum v. Delaware, L. & W.R. Co., 339 U.S. 239, 244 (1950).

The conclusion that the provisions of Article 58 (c) were directed to the reinstatement remedy and not the damage remedy is strengthened by the fact that they were patently designed to meet the requirements of the NRLA for submission of the dispute to the NRAB. These requirements are stated in 45 *U.S.C.*, Sec. 153, First, (i):

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, *shall be handled in the usual manner up to and including the chief operating*

officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis added.)

The word "proceedings" in Item 6 of Article 58 (c) appears to refer to such proceedings.

This intention is further disclosed by the letter of Mr. E. D. Moody under date of January 6, 1955. (R. 23-24).

As has been previously observed, the NRAB has the exclusive jurisdiction to award reinstatement.

See cases cited on page 18 of this brief.

It is submitted, therefore, that (1) there is no language in the agreement which makes the contract procedure for reinstatement either exclusive or a necessary condition precedent to or limitation upon maintenance of an independent action for damages; (2) such a condition cannot be reasonably implied from any language in the agreement; (3) on the contrary, the language of the agreement clearly indicates that use of the contract procedure was intended to be related to the reinstatement remedy only.

c. The procedure provided for in Article 58, section

(c) is, in essence, an arrangement for arbitration and, as such, is unenforceable under Oregon law.

As urged above, the grievance procedure of Article 58 is patently designed to be preliminary to proceedings before the National Railroad Adjustment Board. This Board has, under the statute, the authority to conduct what amounts to compulsory arbitration. If this interpretation is correct, then the appellee's contention amounts to an assertion that the appellant must go through this arbitration procedure before he can bring an action at law. In fact, in the proceeding below, the appellee contended that the grievance procedure was exclusive. While the United States Supreme Court has held in the *Moore*, *Slocum* and *Koppal* cases, cited on pages 16, 18 and 19 of this brief, that the remedy before the National Railroad Adjustment Board is not exclusive as a matter of Federal law, appellee seeks to make it such as a matter of contract.

However, under the common law of Oregon, a general arbitration agreement could be revoked at any time before an award was made.

Ball v. Doud, 26 Or. 14, 37 Pac. 70 (1894);

Shepard & Morse Lumber Co. v. Collins, 198 Or. 290, 256 Pac. (2d) 500 (1953).

The Oregon arbitration statute cannot be applied to

the present case to make a general agreement to arbitrate valid since the case involves a collective bargaining agreement.

> "All persons desiring to settle by arbitration any controversy, suit or quarrel, *except such as respect* the title to real estate or *the terms or conditions of employment under collective contracts between employers and employes* or between employers and associations of employes, may submit their differences to the award or umpirage of any person or persons mutually selected." (Emphasis supplied.)
>
> *ORS 33.210.*

The steps in the collective bargaining agreement which are preliminary to a submission to the National Railroad Adjustment Board amount, in effect, to interim arbitration by certain designated officials of the employer with the right of appeal in the succeeding steps to the superintendent and the general manager or highest designated officer and, ultimately, to the National Railroad Adjustment Board. Each of the several steps is concerned with the entire merits of the dispute and contemplates a decision with respect to the merits of the dispute. The arrangement is not, therefore, a limited arbitration or an appraisal.

Shepard & Morse Lumber Co. v. Collins, 198 Or. 290, 256 Pac. (2d) 500 (1953).

d. Under the decisions of many states an employee discharged in breach of a contract of employment may maintain an independent suit for damages without having pursued grievance or appeal procedures provided in his contract of employment. It is submitted that the reasoning and results of these decisions are more consistent with the decisions of the Federal courts which are cited on pages 17-19 of this brief. The decisions in these states give effect to the distinction between the damage remedy and the reinstatement remedy. They protect the rights of the individual employee who may otherwise be caught in the vise of a procedure administered by his employer and a union which might not be sympathetic to his cause. They prevent the employee from being deprived of a basic civil remedy or of being subjected to a long delay in the exercise of that remedy. Among the decisions in which it has been held that the use of the contract remedy is not required as a prerequisite to a damage action are the following:

Georgia;

Central Georgia Railway Company v. Culpepper, 209 Ga. 844, 76 S.E. (2d) 482 (1953);

District of Columbia;

Condol v. B. & O. R. Co., 199 F. (2d) 400 (C.A.-D.C.; 1952);

Illinois;

Keel v. Illinois Terminal R. Co., 346 Ill. App. 169, 104 N.E. (2d) 659 (1952);

Louisiana;

Gould v. L. & O. R. Co., 203 F. (2d) 238 (C.A.-5; 1953);

(Louisiana statute of limitations of one year applied from date of discharge.)

Texas;

Thompson v. Moore, 233 F. (2d) 91 (C.A.-5; 1955);

Mississippi;

Dufour v. Continental Southern Lines, Inc., ... Miss. ..... 68 So. (2d) 489 (1953).

In the Dufour case cited immediately above, the following language appears in the Court's opinion:

"It is further argued by the appellee that even if it be conceded that the discharge of the appellant for the violation of the rule was not justified, the appellant is precluded from recovery because he did not exhaust all of the administrative remedies provided in Section 3 of Article X of the aforesaid collective bargaining agreement. This section provides a procedure by which a discharged employee may obtain an investigation as to the justification of his discharge and for demanding in writing within fifteen days from the date of notification of his discharge a hearing, and for appeals, and providing that the failure of the appellant to comply with this provision of the agreement constitutes a waiver and forfeiture of any claim. It is said by the appellee that this provision of the agreement was not complied with and that, therefore, the appellant is

precluded from recourse to the courts by suit to recover damages for his wrongful discharge. *This is not a proceeding by the appellant seeking restoration to his employment. It is a suit for damages occasioned by his alleged wrongful discharge, and one in which his personal rights and property rights are involved.* The contention of the appellee that the appellant is precluded by his failure to first exhaust administrative remedies provided in the collective bargaining agreement has been expressly decided by this Court adversely to such contention in the case of *Tri-State Transit Company of Louisiana v. Rawls*, 191 Miss. 573, 1 So. (2d) 497, wherein the Court held that 'the plaintiff is not required to exhaust these administrative remedies as a prerequisite to recourse to the courts by suit to recover damages for an unjustified discharge,' citing the case of *Moore v. Illinois Central Railroad Co.*, 180 Miss. 276, 176 So. 593." (Emphasis added.) (at Page 494.)

In the case of *Barker v. Southern Pacific Company*, 214 F. (2d) 918, which is discussed on page 22 of this brief, this Court, in deciding a case which arose in California, affirmed the summary judgment of the District Court in favor of the defendant, a railroad company. The facts of that case are different from those of the present case since in that case the employee had failed to comply with a condition which was a condition precedent to the performance of the promise on the part of the employer, while in the present case the employer had breached its agreement by failing to give notice and hearing before the discharge. In addition to the language quoted from the *Barker* decision on page 22 of this brief, the

following language of the Court's opinion is relevant to the present question:

> "The wording of Rule 25 appears to us to require the timely *filing* of the request for hearing as a prerequisite to any further proceedings under the contract, or any possible appeal to the courts of law. Rule 25 (i) provides for the 'further handling' of a grievance in the event that the prescribed contract procedure is carried to completion without success by an aggrieved employee, hence it would seem that Rule 25 might embrace both administrative procedure, and possible recourse to the courts. It is our view that the filing of a request (under the contract) for a hearing, is intended to be a condition precedent to both procedures above referred to.
>
> "It is argued by appellant that notwithstanding the contractual provisions, an employee need not exhaust his administrative remedies unless required so to do under the applicable state law. It is questionable whether this doctrine is applicable, where, by contract, the request for a hearing has been made a condition precedent to the bringing of a lawsuit. *Wallace v. Southern Pacific Co.*, 106 F. Supp. 742 (21 Labor Cases, P. 66,882). But even if such is the correct doctrine, California law would be applicable and controlling. See *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (23 Labor Cases, P. 67,639). It is clear by that law that administrative remedies must be exhausted prior to taking recourse to the courts. 2 Cal. Jur. 2d 304, *et seq.* Admin. Law § 184, *et seq.* and cases cited therein. Since this issue involves a pure question of law it is properly open to decision on this appeal." (at Pages 919-920.)

It can be seen from the above language that in the *Barker* case the court did not decide whether the grievance procedure in that agreement was a necessary pre-

liminary to both administrative procedure and recourse to the courts.

There are a number of decisions from other states holding that the administrative procedure must be exhausted. These states include California, as noted in the *Barker* decision quoted above, and Missouri, as noted in the case of *Transcontinental and Western Air, Inc. v. Koppal*, 345 U.S. 653 (1952). The cases so holding which the writer has found and examined did not involve a factual situation such as the one here in which the employee had been discharged without a notice and hearing required by the agreement. The importance of this factual distinction will be discussed in the next specification of error. Also, these decisions did not consider the distinction beween the reinstatement remedy and the damage remedy which was noted by the Court in *Dufour v. Continental Southern Lines, Inc.*, ... Miss. ..... 68 So. (2d) 489 (1953), cited immediately above and which has been developed in this brief.

SPECIFICATION OF ERROR No. II

The District Court erred in failing to find and conclude that the appellee's breach of its contract of employment with appellant was of such character and importance that it excused any compliance by appellant with the provisions

of Article 58 which might otherwise have been required.

This specification covers matters raised by the following points of appellant's Statement of Points on Appeal: Point 5 (b) and (c) and Point 6 (a), (e) and (i) (R. 49-51). Under this specification appellant is assuming, for purposes of argument only, that Article 58 can be construed so as to require a discharged employee to exhaust the procedures of the Article in order to maintain an independent action for damages.

Appellant's position on this point is that he was excused from following the procedure because of appellee's conduct, specifically the following conduct: Appellee engaged in the initial breach of the contract of employment by failing to accord appellant a proper investigation after appropriate notice (R. 17-18); Appellee did not give appellant official notice of his discharge and the reasons therefor within 30 days of his dismissal (R. 18). When appellant, through Mr. Felter's letter of January 10, 1953, made a request for reinstatement, he was informed that there was nothing that could be done toward "giving favorable consideration to permit Mr. Peoples to return to service for the Southern Pacific Company". (R. 19-20). Later, when appellant wrote directly to Mr. Hopkins, he was again advised that there was nothing that could be done regarding the possibility of being returned to Southern

Pacific service. (R. 22-23). The appellee, after learning of Mr. Peoples' return and availability, made no effort to give him a copy of the decision resulting from the investigation or to afford him the hearing which he had missed. Instead, the appellee advised him in rather blunt language that it had no intention of giving his case any consideration whatsoever or of offering him re-employment, let alone reinstatement with full seniority rights.

There were no specific facts, admitted or alleged, in the Pre-Trial Order setting forth any excuse on the part of the appellee for not having given the appellant notice of the charges and hearing. The appellee did contend that it made every reasonable effort to locate the appellant and give him notice and that this was in compliance with the collective bargaining agreement. (R. 34). However, the appellant in his contentions had alleged specifically that he had given his address to the station agent at Ashland on September 10th; that by rule and practice of the appellee he was required to report his address to that agent, and that notices of this type were customarily given employees through the agent or chief clerk of the employee's home terminal, in this case, Ashland; that appellee did not send the notice to appellant's last known post-office address; and that the appellee did not attempt to learn

of appellant's address or whereabouts from his neighbors or landlord or from the agent or chief clerk at Ashland. (R. 29-30).

These allegations of specific facts were denied by the appellee.

It is submitted, however, that the mere general assertion on the part of the appellee that it had made every reasonable effort to locate appellant was not a sufficient allegation of facts which would constitute an excuse of appellee's failure to comply with the terms of the agreement. In any event, the most that can be said for appellee on this point is that there was a genuine issue with respect to material facts essential to appellee's case which should have prevented the entry of a summary judgment.

In discharge cases the collective bargaining agreement in Article 57 prescribes the mechanics for effecting the dismissal of an employee. Article 58 then sets forth the mechanics by which the employee may secure a review by higher officials of the carrier of action taken under Article 57 for the purpose of securing reinstatement. (R. 10-15). The initial steps in the entire procedure are those to be taken by the employer pursuant to Article 57. Where the initial steps have not been taken, there is nothing which can be properly reviewed on appeal. The agreement contemplates that the employee

will make a record in reply to the charges against him at the formal investigation and that the officers will review that record on appeal. Here no record was or could be made. Moreover, the appellee knew that appellant was not present or represented at the hearing. Appllee did not offer to rectify that omission and give appellant a chance to make a record. On the contrary, it refused to give him any consideration whatsoever.

In similar cases which have been decided by the NRAB it has been consistently held that where an employee has been disciplined without proper investigation, the employee is relieved from complying with the grievance procedure.

> "Where an employee is disciplined without a proper investigation, such purported discipline is a nullity, of no force and effect, and a failure to appeal within the stipulated period for appeal cannot validate the void discipline. Thus, Award No. 5166 states, 'the purported dismissal was of no force and effect and a failure to appeal cannot validate the void dismissal.' Award No. 1055 states: 'The claimant in this case was dismissed from service without having been charged with an offense and without a hearing. His failure to immediately protest his dismissal cannot condone its impropriety.'
>
> "Also, Award No. 9561 holds: 'It cannot be that what occurred there was the fair and impartial hearing contemplated by the agreement. It was, in fact, no hearing and the awards of this Division which hold that objections to methods employed in investigations and hearings must, if later relied on, have been made at the time used, do not apply to cases where there is a total absence of any hearing or proper investigation.' "

Lazar, "Due Process on the Railroads: Disciplinary Grievance Procedures before the National Railroad Adjustment Board, First Division," Institute of Industrial Relations, University of California, Los Angeles (1953), p. 8.

A case very similar on its facts to the present case is that of *New Orleans Public Belt R. Comm. v. Ward*, 195 F. (2d) 829 (CA-5; 1952). This was an action to enforce an order of the NRAB awarding appellee reinstatement with appellant carrier. Mrs. Ward had been granted an indefinite leave of absence. Before she applied for reinstatement her name had been taken off the seniority list at the request of the union. When she applied for reinstatement, it was refused. Section VI, Rule 2 (a) of the collective bargaining agreement provided that no employee should be disciplined or dismissed without an investigation. Before the NRAB and the Court, the carrier contended that Mrs. Ward had failed to comply with Rule 1 (a) of the section which provided that should an employee desire to make a complaint on account of unjust treatment or violation of any of the provisions of the agreement, he must make such a complaint to the head of his department within 24 hours of the occurrence.

The Court stated that while it wasn't clear that either rule applied to a case of requested reinstatement after layoff that if either rule applied it was 2(a).

The Court then stated:

> "While we recognize the requirement that relief be sought through any applicable procedure outlined in the contract as a prerequisite to resorting to the Adjustment Board, we think that there was no failure on Mrs. Ward's part to meet that requirement."

Under general principles of contract law, performance of a precedent conditon by a promisee-plaintiff may be excused by conduct of the promisor-defendant where such conduct prevents performance of the condition by the promisee or amounts to a repudiation of the promise.

12 *Am. Jur.*, "Contracts," Secs. 328-330;

Longfellow v. Huffman, 49 Or. 486, 491-492, 90 P. 907 (1907);

Winklebleck v. City of Portland, 147 Or. 226, 239-240, 31 P. (2d) 637 (1934);

Gabriel v. Corkum, 183 Or. 679, 691, 196 P. (2d) 437.

Likewise, the performance of a condition precedent to maintaining a legal action on a broken promise may be similarly excused.

1 *Am. Jur.*, "Actions," Sec. 34;

Ringo v. Automobile Insurance Co., 143 Or. 420, 22 P. (2d) 887 (1933).

(Denial of liability within period prescribed for

proof of loss held to excuse such proof as condition to maintaining action.)

The conduct of appellee in the present case made the use of the appeal procedure of Article 58 useless and futile. The original discharge of appellant and the conduct of appellee subsequent thereto certainly amounted to a repudiation of its promise to give appellant a fair and impartial hearing.

There are sufficient facts alleged in the Pre-Trial Order to suggest that appellee did not act in good faith at any stage of appellant's dismissal; that it wasn't intended that appellant receive notice of the charges and hearing and that thereafter it was never intended that his claim for reinstatement be given any consideration. It can certainly be said that the record is sufficient to show that use of the grievance procedure by the appellant would have been entirely futile, and would have served no useful purpose.

The most that can be said for use of the procedure is that it would have given appellee, through its higher officials, the opportunity to correct any mistake made by the trainmaster. However, the record already shows that it would have served no such purpose since the superintendent refused at the first stage of the grievance machinery to give appellant any consideration. At that

point it would have been appropriate to afford appellant the hearing to which he was entitled. He could then have made proper use of the grievance procedure. As it was, he was entirely justified in abandoning further the pursuit of a futile and useless appeal.

It is significant that decisions which are noted earlier in this brief in which it was held that the employee did not have a cause of action because he did not exhaust his administrative remedies are decisions in which the plaintiff was given a proper investigation or in which he failed to request an investigation as provided by the agreement. The present case is, therefore, to be distinguished on its facts from those decisions.

SPECIFICATION OF ERROR No. III

The District Court erred in granting appellee's motion for summary judgment and in entering a judgment against the appellant.

This specification covers appellant's Appeal Point No. 1 and that part of Point No. 3 which excepted to the Court's Finding of Fact No. V, and that part of Point No. 4 which excepted to the Conclusion of Law No. IV.

The entry of the summary judgment against appellant and in favor of appellee was erroneous for the reasons stated in Specifications of Error Nos. I and II.

It was also erroneous for the reason that there were genuine issues of material fact which precluded entry of such a judgment.

In the argument of Specification of Error No. II we have urged that the appellee was not excused from giving appellant notice and hearing as required by the agreement; that no specific facts were alleged which would constitute an excuse for failure to give the notice of hearing and, as stated at that point in the brief, the most that can be said for appellee's position is that there were disputed facts with respect to this essential question.

The Court, in its finding No. V. (R. 42) stated that the appellant was dismissed by the appellee from its service for violation of Rule 810 of the transportation department which prohibits employees from leaving or remaining away from their employment without proper authority. It is not clear whether the Court intended by this finding to pass upon the merits of the charges against the appellant. Possibly the Court merely intended to state that this was the reason given by the appellee or that it was the purported reason for the action taken. If, however, the Court intended to find that the appellant was discharged for cause, as contended by the appellee, then the Court disregarded a number of genuine issues of material fact. The con-

tentions of the appellant with respect to the merits of his discharge are stated in the Pre-Trial Order, pages 30-32, and are summarized in this brief at pages 8-9. These contentions, if correct, would support a finding that the appellant was not discharged for the purported reason given or that his discharge was unjust and contrary to the provisions of his contract of employment in that his absence was in accord with established custom and practices and was not contrary to any regulation of which the appellant had notice. There was also a disputed issue of fact on whether the appellant had notice of Special Notice No. 279 which had been issued by the appellee and whether the provisions of that notice were effective in the division.

To the extent that the judgment order depends upon the Court's Finding of Fact No. V, the judgment was erroneous and contrary to law.

SPECIFICATION OF ERROR No. IV

The District Court erred in denying appellant's motion for summary judgment.

The undisputed facts before the lower court provided all the essential elements of an action for breach of contract against the appellee.

It was admitted that the appellee breached its un-

equivocal and unconditional promise to appellant that it would not discharge or discipline him without first notifying him of the specific charges against him and giving him a fair and impartial hearing. (R. 10).

This was breach of duty which was actionable unless Article 58 of the collective bargaining agreement imposed some valid limitation on appellant's right to maintain an action. In Specifications of Error numbered I and II we have urged that Article 58 did not constitute a valid limitation and that, even if it did, the performance by appellant of the terms of the article was excused.

If this view is correct, then all the elements of appellant's case were undisputed except the proof of damage. Appellant was, therefore, entitled to a summary judgment on the question of liability.

There is only one issue of which it could be plausibly argued that there was a dispute of material facts with respect to appellee's breach of duty. That is the issue of whether appellee was legally excused from giving appellant the notice and hearing required by the contract. Such excuse would, we believe, be a matter of affirmative defense to be alleged and proved by appellant. As developed in the argument of Specification of Error Number II on pages 38-39 of this brief, appellee

did not sufficiently allege such a defense. Appellee's only allegation on this point was the conclusion stated as a contention in the Pre-Trial Order that it made every reasonable effort to locate appellant and give him notice and that this was compliance with the agreement.

Respectfully submitted,

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